

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARYANNE F. PITTMAN**

Claimant

VS.

**SANDHU HOSPITALITY, INC., d/b/a Comfort Inn**

Respondent

AND

**TECHNOLOGY INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,036,574

**ORDER**

Claimant appeals the September 7, 2010, Award of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was denied an award of permanent partial disability compensation (PPD) in this matter after the ALJ determined that claimant had failed to prove that she suffered any permanent impairment as the result of an accident on August 27, 2007. Additionally, the ALJ found that claimant had failed to prove that she was entitled to any permanent partial general disability (work disability) from the accident. The ALJ found claimant to lack credibility after claimant denied being employed, and requesting and receiving temporary total disability compensation (TTD) for many months, during which time claimant was employed full time with a different employer. Nevertheless, the ALJ found that claimant did suffer permanent injury by accident arising out of and in the course of her employment with respondent. Medical compensation was awarded.

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Ryan D. Weltz of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on December 2, 2010.<sup>1</sup>

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<sup>1</sup> Due to the retirement of Carol Foreman, E. L. Lee Kinch, of Wichita, Kansas, was appointed to serve as a Board member pro tem in this matter.

### ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent on the date alleged? Respondent contends that the description of the accident by claimant and the supporting testimony of claimant's husband conflict. Additionally, respondent contends the description of the accident by claimant is a physical impossibility.
2. What is the nature and extent of claimant's injuries and disability? Claimant argues that she is entitled to both a whole body functional impairment and a work disability for the injuries allegedly suffered on August 27, 2007. The ALJ determined that claimant, while experiencing an accident on August 27, 2007, failed to prove that she suffered a permanent injury from that accident. Respondent argues that, if claimant did suffer an accidental injury on the date alleged, the award of the ALJ should be affirmed and claimant should be denied any permanent impairment or disability from that accident.<sup>2</sup>

### FINDINGS OF FACT

Claimant was employed by respondent in Manhattan, Kansas, as a housekeeper. Claimant alleges that she suffered an accidental injury on August 27, 2007, while transporting her cleaning cart on the elevator in respondent's building. On the date of accident, claimant contends that the elevator, on which she was riding with her cart, jerked and became stuck between floors. Claimant testified that when the elevator jerked, the cart pinned claimant against the control panel. Claimant was unable to move the cart and remained pinned for five minutes until the maintenance person, claimant's husband, was able to open the doors of the elevator and free claimant.

Claimant immediately reported the incident to Irene Carter, the person at the front desk. Ms. Carter then apparently input information into the computer about the incident. Tina Rodriguez, respondent's general manager, was notified of the incident. Ms. Rodriguez testified that it was unlikely that the accident occurred as claimant described. First, the wheels of the cart were fixed and would not roll to the side. The floors of the elevator were carpeted, again limiting the mobility of the cart. Additionally, the accident allegedly occurred at the end of claimant's shift. By that time, the cart would have been considerably lighter and claimant should have been able to move the cart with ease. Finally, with the way the cart would have been pushed into the elevator, the end would have been away from the control panel and would not have pinned claimant as was

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<sup>2</sup> The ALJ made no determination regarding claimant's entitlement to future and unauthorized medical treatment and TTD.

described. Ms. Rodriguez did agree that there had been complaints about that elevator jerking and getting stuck between floors as claimant described.

Claimant went to the Flint Hills Free Health Clinic and later to Mercy Regional Health Center (Mercy) where x-rays were taken and claimant was given work restrictions. Respondent was unable to meet the restrictions, and claimant was terminated.

At the preliminary hearing on November 14, 2007, claimant was asked whether she was working anywhere. Claimant denied having any job, testifying that she could not look for a job at that time. Claimant denied being able to work and testified that she had no transportation to a job. However, at the regular hearing, information was presented which showed that claimant had obtained full-time employment with Auth Florence beginning on September 10, 2007,<sup>3</sup> approximately two months before the preliminary hearing. Claimant worked for Auth Florence until being laid off on February 3, 2009. After that, claimant applied for and was paid unemployment benefits. Claimant was paid TTD for 15 weeks, beginning on August 30, 2007, and continuing until January 9, 2008. An August 29, 2007, doctor's note from Mercy took claimant off work for two weeks. Claimant presented the note to respondent, which caused her to be terminated by respondent, after which claimant sought and obtained employment with Auth Florence.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Lynn A. Curtis, M.D., on September 28, 2007. Dr. Curtis diagnosed claimant with right groin injury, right hamstring injury, right greater than left SI joint injury and a low back injury. Interestingly, Dr. Curtis determined that claimant needed comprehensive rehabilitation and was temporarily totally disabled. This was two weeks after claimant began working for Auth Florence. Dr. Curtis determined that, based on the examination and history, all of claimant's injuries were the result of the elevator drop at work.

Dr. Curtis again examined claimant on June 18, 2009. At that time, he found claimant to have reached maximum medical improvement (MMI). Claimant still displayed problems with her SI joint and low back and still exhibited hamstring weakness. Claimant was rated at 5 percent whole person impairment to her low back for the SI joint problems and 6 percent whole person impairment for the hamstring weakness in her right lower extremity. These combined for an 11 percent whole person impairment, all pursuant to the fourth edition of the *AMA Guides*,<sup>4</sup> and all from the elevator incident at respondent's facility. Dr. Curtis reviewed a task list prepared by vocational expert Dick Santner which contained 30 tasks performed by claimant over the previous 15 years. Dr. Curtis found claimant

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<sup>3</sup> R.H. Trans. (March 11, 2010) at 33.

<sup>4</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

unable to perform 13 of the tasks, for a 43 percent task loss. At the first examination, Dr. Curtis had recommended radiographic studies, including an MRI and x-rays of claimant's lumbar spine. He was unable to recall if he had ever been provided copies of those tests. The report of June 18, 2009, does not list any such studies. Dr. Curtis acknowledged on cross-examination that his final diagnosis was made without reference to radiographic studies. He also acknowledged that his opinion was based, in part, on the history provided by the patient. Claimant's history to Dr. Curtis did not list prior back complaints. According to Dr. Curtis, if claimant had discussed prior back complaints with him, it would have been noted in the history. Claimant told Dr. Curtis that she had gained 42 pounds since the accident. However, on September 28, 2007, claimant weighed 128 pounds. At the time of the examination on June 18, 2009, claimant weighed 137 pounds.

Claimant was referred by respondent to board certified internal medicine specialist Chris D. Fevurly, M.D., for an examination on November 3, 2008. Claimant displayed tenderness over the low back but had well-preserved range of motion without neurological deficits. Claimant had no problems with gait or transfers, but did display dramatic pain behaviors during the examination. Claimant was diagnosed with chronic regional back pain with dramatic examination and multiple psychosocial risk factors for a delayed recovery. Claimant was assessed a 5 percent whole person impairment secondary to the chronic back pain, pursuant to the fourth edition of the *AMA Guides*.<sup>5</sup> The history obtained from claimant listed no significant prior low back problems. Claimant denied prior motor vehicle accidents.

At the regular hearing, claimant was asked about past low back problems. Claimant denied ever having any such problems. Claimant was then presented with medical reports from family medicine specialist Debra Doubek, M.D. Those reports display medical records from June 12, 2007, and July 10, 2007. The June 12 report noted tenderness over the L1-2 region in claimant's back. The July 12 report was for a pelvic and breast examination with no notation of low back complaints. However Dr. Doubek testified that claimant told her at the July 10 visit that claimant had chronic lumbar back pain and needed Tramadol for the pain. Dr. Doubek testified that the history form had been filled out by claimant and displayed a past fractured sternum, hysterectomy, broken finger and a low back injury from a car accident. At the hearing held April 13, 2010,<sup>6</sup> claimant denied the low back history and denied being in a car wreck five years before the June 12, 2007, examination, even though that was also reported to Dr. Doubek. Claimant had reported that something was fractured in her back and she experienced shooting pain through her thighs and shoulders and she had trouble lying down. Again, claimant denied all of this

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<sup>5</sup> *AMA Guides* (4th ed.).

<sup>6</sup> Cont. of R.H. Trans. (April 13, 2010).

history. Claimant reported pain on a level of 7 out of 10 during the June 12 examination. Dr. Doubek identified Tramadol as a pain medication for moderate to severe pain.

This history of prior back pain was presented to Dr. Fevurly, after which he determined that claimant had no permanent impairment from the August 27, 2007, accident.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>7</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>8</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>9</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>10</sup>

A claimant carries the burden to prove that an accident occurred which arose out of and in the course of his or her employment with the respondent. Here, the burden must

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<sup>7</sup> K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

<sup>8</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>9</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>10</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

be carried, in substantial part, based upon claimant's credibility. The incident as described in the elevator was witnessed by no one except claimant's husband, who came upon the scene after the fact. Claimant's testimony becomes significant when considering whether an accident actually occurred as alleged.

This claimant has a serious credibility problem. She denied prior low back problems even when faced with the medical records of Dr. Doubek. She denied a history which, in the words of Dr. Doubek, was in claimant's own handwriting. Claimant testified that she was physically incapable of working at a time when she was working and had been employed for two months. Claimant also claimed and collected TTD while working full time. Claimant presented a work slip indicating that she could not work for two weeks and then proceeded to seek and obtain work with Auth Florence, all within that two-week period.

Additionally, the descriptions of the scene and the events leading to claimant's release from the elevator, as provided by claimant and her husband, conflict involving several details. Finally, the testimony of Ms. Rodriguez casts doubt on the possibility of the accident happening as claimant described.

Here, the ALJ found that an accident had happened as claimant described. The Board disagrees. Claimant's testimony lacks credibility. Too many conflicts exist with regard to claimant's testimony and the circumstances of the alleged incident, claimant's employment after leaving respondent, claimant's preexisting low back problems and the preexisting medical documents created in claimant's own hand.

The Board finds that claimant has failed to prove, by a preponderance of the credible evidence, that she suffered the accident as alleged. The award of benefits by the ALJ is reversed.

#### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed. Claimant has failed to prove that she suffered an accidental injury which arose out of and in the course of her employment with respondent, as alleged. The award of benefits in this matter is reversed.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca Sanders dated September 7, 2010, should be, and is hereby, reversed and claimant is denied an award against respondent.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge